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Mr. B. L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, NW, Room 1046
Washington D.C. 20573-0001
U.S.A.

21st May 2002

Dear Mr. VanBrakle,

**46 CFR Part 540 Docket No. 02-07 Notice of Proposed Rulemaking**

I refer to the Notice of Proposed Rulemaking which was served on 17th April 2002.

I am the Secretary of the International Group of P&I Clubs but am not writing to you on this occasion in that capacity since non-performance is not one of the risks which is covered by the Clubs in the International Group and is therefore not one of the risks which is covered under our Pooling Agreement which is the main raison d'etre of the International Group. However for the sake of convenience, I have been asked to write to you on behalf of those Clubs that have provided section 3 guarantees to the FMC in the past.

As you are aware, some Clubs which are members of the International Group provide cover in respect of the liabilities of shipowners towards passengers for death or personal injury and furthermore provide the necessary evidence of financial responsibility to comply with section 2 of Public Law 89-777. Some Clubs have also on occasion and as a service to their cruise-line members provided section 3 security in relation to non-performance even though this is not a risk which is covered by the Clubs. However, this would of course only be done against first class bank counter-security arranged by the passenger vessel operator.

In recent years many vessel operators have chosen to self-insure and these carriers will be severely affected by the proposal to discontinue the self-certification route for establishing financial responsibility.

At present there appear to be 4 methods by which a passenger vessel operator can seek to establish evidence of financial responsibility in relation to s.3 of Public Law 89-777. They are:

1. A bond from an authorised U.S. bonding company;
2. A guarantee from a P&I Club which is a member of the International Group;
3. An escrow account;
4. Self-certification.

As we understand the position, it is now being proposed that the fourth route should be abolished.

As you are no doubt aware, the U.S.bonding industry has suffered severe losses in recent months and is unlikely to be eager to step into the breach, especially in relation to non-U.S. based companies. This leaves the P&I Clubs as one of the two remaining sources of certification capacity. In putting forward the proposal to discontinue self-insurance it may have been assumed that the Clubs would be able to provide security at the levels anticipated in the Notice of Proposed Rulemaking. My purpose in writing therefore is to make it clear that Clubs would not be willing to increase their involvement in the provision of security. At present Clubs are authorised by their Boards to provide security up to a limit of $15million and it is extremely unlikely that Boards would be prepared to countenance an increase in this figure.

Accordingly, we would respectfully suggest that the proposed rulemaking either be reconsidered or postponed in order to permit more detailed consultation with the cruise industry, including but not limited to the identification of suitable sources of certification capacity.

We stand ready to provide further information and comment as necessary.

Yours sincerely,

D.J.L. Watkins

**From:** Ed Welch <EWelch@vesselalliance.com>
To: "'secretary@fmc.gov'" <secretary@fmc.gov>
Date: 5/23/02 4:54PM
Subject: Comments on Docket No. 02-07

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Dear Mr. Secretary - The attached document is submitted for the record in your Docket No. 02-07, Notice of Proposed Rulemaking, Financial Responsibility Requirements for Nonperformance of Transportation -- Discontinuance of Self-Insurance and the Sliding Scale, and Guanrantor Limitations.

<<fmc docket 02-07 comments.doc>>

Sincerely,

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May 23, 2002

Mr. Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Room 1046
Washington, DC 20573-0001

Re: Docket No. 02-07

Please accept these comments from the Passenger Vessel Association in response to your Notice of Proposed Rulemaking on "Financial Responsibility Requirements for Nonperformance of Transportation - Discontinuance of Self-Insurance and the Sliding Scale, and Guarantor Limitations," as published in the ***Federal Register*** of April 23, 2002.

The Passenger Vessel Association is the national voice of U.S.-flag passenger vessels of all types, including overnight cruise vessels. U.S.-flag overnight cruise vessels operate on coastwise routes (in Alaska, on the Columbia, Sacramento, and Mississippi River systems, and along the U.S. east coast). In contrast to larger cruise ships carrying thousands of passengers, U.S.-flag overnight cruise vessels are smaller, most carrying between 50 and 225 passengers. Only two U.S.-flagged vessels carry more than 225 passengers, and both of these carry just over 400 passengers.

PVA agrees with the Commission's concern that there must be adequate, effective methods of protecting and reimbursing passengers in the event of nonperformance by a passenger vessel operator. PVA acknowledges that the four incidents of nonperformance by passenger vessel operators cited in the ***Federal Register*** notice (including one by a U.S.-flag company, at the time a member of our Association) warrant the Commission's review of the current rules.

Unfortunately, the Commission's proposed rule raises serious problems because it: (1) deals a harsh financial blow to operators of smaller passenger cruise vessels, thereby making it even more difficult for these operators to compete against operators of massive cruise ships; (2) has the effect of the U.S.

Government favoring operators of foreign-flagged vessels and throwing regulatory obstacles in the way of U.S.-flagged passenger vessels; and (3) gives no realistic transition time to enable an operator using the self-insurance or guaranty methods to move to a workable alternate method of demonstrating financial responsibility.

**The FMC puts smaller vessels at a disadvantage.**

The statue imposes the financial responsibility requirement with regard to "a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports." U.S.-flag overnight cruise vessels typically carry between 50 and 225 passengers. On first glance, the existing and proposed rules appear to be neutral with regard to their impact on larger and smaller vessels. In reality, however, the rules favor large operators. The $15 million ceiling (which would not be affected by the current rulemaking) means that a smaller operator generally must obtain a bond or create an escrow account in the amount of all the operator's unearned passenger revenue. In contrast, a larger operator may have unearned passenger revenue in amounts more than ten-times higher than the $15 million cap.

Since smaller U.S.-flag ships that operate in Alaska in fact compete for passengers against their larger counterparts, this $15 million cap creates a severe disadvantage.

**The law and the proposed rule discriminate against U.S.-flag operators.**

Since U.S.-flag operators have smaller vessels, the fact that the FMC rules favor large vessels has the additional effect of hurting the U.S.-flag segment of the overnight cruise industry. However, there is another way that the law and the FMC regulatory structure harm U.S.-flag operators.

Let's review the applicability of the statute. It comes into play with regard to "a vessel having berth or stateroom accommodations for fifty or more passengers and ***which is to embark passengers at United States ports."*** Because of the geographic limitation, this law as it operates in the real world imposes a requirement on certain U.S.-flag operators while failing to address the financial responsibility of foreign-flag operators that compete with them in the same trade.

For instance, there exists a booming market for carrying U.S. citizens as passengers to Alaska. Most of the market is dominated by foreign-flag operators, the majority of whom embark their passengers in Vancouver, British Columbia; therefore, most foreign-flag operators carrying Americans in Alaska are not subject to the financial responsibility law. However, smaller U.S.-flag operators offer coastwise cruising in Alaska. Because these are U.S.-flag operators subject to the Passenger Vessel Services Act, their vessels embark from U.S. ports and are thereby subject to the financial responsibility requirement.

We have a situation in which a governmental policy neutral on its face has the effect of imposing financial requirements on the U.S.-flag operator while providing a "pass" to the foreign operator. Consider the other advantages the foreign operator has: freedom from U.S. and state corporate income taxes; the ability to employ crew members at wage rates far below those minimum levels established by the Federal Fair Labor Standards Act, and so forth.

PVA recites these differences between foreign and U.S. operators with full recognition that most of these policies are completely beyond the legal responsibility of the Federal Maritime Commission. However, it's not beyond the ability of the Commission to take note of these facts as it develops policies for areas in which it does have responsibility. The financial responsibility statute is written broadly enough for the Commission to tailor a rule that does not have the unintended effect of favoring the foreign operators.

**There must be an adequate transition time for U.S.-flag onerators who have used self-insurance.**

The proposed rule is defective because it abruptly removes the self-insurance option and drastically curtails the guaranty option without giving the affected operators sufficient time to alter their company finances to adopt other methods of demonstration of financial responsibility. According to the ***Federal Register*** notice, there may be only two companies that currently employ these options. It is PVA's understanding that both are U.S.-flag operators. It is totally unrealistic for the Commission to expect these companies to extract millions of dollars from their current financial structures to place into escrow accounts, especially in the middle of a fiscal year or an operating season. PVA encourages the Commission to work with these operators to develop a gradual and realistic timetable for moving to alternate methods of financial responsibility.

**Summary**

The Commission must temper its rulemaking by taking into account the special needs of smaller overnight cruise vessels. What is appropriate and doable for a large vessel carrying thousands of passengers may be harmful for a vessel carrying fewer than two hundred persons.

The Commission must understand that rules neutral on their face often cause competitive problems for U.S.-flag operators who already must contend with U.S. taxation and regulatory policies not applicable to foreign-flag vessels that may compete with them in the same market. The Commission should not inadvertently throw another regulatory roadblock into the way of the U.S.-flag passenger vessel industry.

The Commission must realize that its current rules (the $15 million cap) and the current statute ("embark passengers at U.S. ports") create huge gaps in the protection of U.S. passengers against nonperformance. By focusing only on the question of methods of demonstration of financial responsibility, the current rulemaking deals with a smaller issue and ignores a considerably larger one. Perhaps the Commission should deal with all these issues at once (including consideration of a proposal to Congress to amend the statute to cover all cruise vessels that embark U.S. passengers at all North American ports).

Sincerely,

Edmund B. Welch
Legislative Director
Passenger Vessel Association